

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY PIXLER)	
Claimant)	
VS.)	
)	Docket No. 189,936
PKM STEEL SERVICES, INC.)	
Respondent)	
AND)	
)	
COMMERCIAL UNION INSURANCE CO.)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the Award dated June 29, 1995, entered by Administrative Law Judge George R. Robertson.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for the respondent and its insurance carrier. Jeffrey E. King of Salina, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge denied claimant's request for permanent partial disability benefits and also denied the respondent's request to assess liability against the Workers Compensation Fund. At oral argument, the issues before the Appeals Board were narrowed to the following:

- (1) Does K.S.A. 44-501(c) preclude claimant's recovery of permanent partial disability benefits?
- (2) The nature and extent of claimant's injury and disability.
- (3) The liability of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

- (1) The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on February 16, 1994. On that date claimant turned a 300-pound steel beam and hurt his back.

One of the reasons given by the Administrative Law Judge in denying claimant's request for permanent partial disability benefits is that claimant did not miss any work after the February 1994 accident. The Administrative Law Judge cited K.S.A. 44-501(c). As of the date of accident and date of the Award, K.S.A. 44-501(c) read as follows:

"Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."

However, the 1996 Kansas Legislature deleted the above-quoted language from the statute and provided that such change was to be retrospectively applied to all claims that had not been fully adjudicated. See Senate Bill No. 649. Therefore, K.S.A. 44-501(c), as amended, does not preclude claimant from receiving permanent partial disability benefits.

- (2) The Appeals Board finds that claimant sustained additional permanent injury and impairment as a result of the February 16, 1994, accident. This conclusion is based upon claimant's testimony regarding his ongoing problems and symptomatology, and that testimony of claimant's expert medical witness, orthopedic surgeon Edward J. Prostic, M.D.

Dr. Prostin examined claimant in September 1994 at claimant's attorney's request. He diagnosed claimant as having a small protrusion of the L5-S1 disc, degenerative disc disease at multiple levels, and mild S2 radiculopathy. Also, he felt that claimant had two-level lumbar disc disease that had become symptomatic. Dr. Prostin testified that claimant's back worsened as a result of the February 1994 accident as indicated by the symptomatology in the left leg, loss of motion in the back, and progression of degeneration as shown by x-ray. According to the doctor, before the February 1994 accident claimant had a 7.5 percent whole body functional impairment due to back problems as compared to the 17.5 percent whole body functional impairment that claimant now has after that accident. Both functional impairment ratings were based upon the AMA Guides to the Evaluation of Permanent Impairment.

Orthopedic surgeon Gary L. Harbin, M.D., testified on behalf of the respondent that he saw claimant on two occasions in 1990 for back problems that he diagnosed as a probable herniated disc. An MRI taken at that time indicated mild degenerative changes at L4-5 and L5-S1 and a slightly left-sided disc at L5-S1. Dr. Harbin testified that he did not see claimant after the February 1994 accident and, therefore, could not comment whether claimant sustained permanent injury as a result of that accident.

The respondent also presented the testimony of Byron W. Tomlins, D.C., who treated claimant in August and September 1992 for a low back injury. At that time the doctor diagnosed lumbar strain/sprain and low back myofascitis and recommended a back brace. When Dr. Tomlins released claimant from care in September 1992, he recommended to claimant that he should use caution with lifting and should practice preventive care such as exercise, moist heat therapy, and weight control. The doctor again saw claimant on February 16, 1994, immediately after claimant had reinjured his back at work. Again, he diagnosed lumbar strain/sprain and low back myofascitis. Dr. Tomlins took claimant off work until Monday, February 21, 1994, and began administering treatment. He last saw claimant on March 16, 1994, at which time he referred claimant to a neurologist who in turn recommended an orthopedic evaluation. When asked whether the February 1994 accident permanently aggravated claimant's preexisting back problems, Dr. Tomlins stated that only time would tell.

Based upon the entire record, the Appeals Board finds that claimant has established that it is more probably true than not that he permanently aggravated his preexisting back condition as a result of the February 16, 1994, accident. Because his is an "unscheduled" injury, the determination of permanent partial general disability benefits is governed by K.S.A. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between

the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Because claimant has returned to work for the respondent, claimant does not contend that he is entitled to a work disability but rather concedes his benefits should be based upon the functional impairment rating. Based upon the entire record, the Appeals Board finds that claimant sustained an additional 10 percent whole body functional impairment as a result of the February 1994 accident as indicated by Dr. Prostic. Claimant's argument that the ultimate functional impairment of 17.5 percent should not be reduced by the 7.5 percent functional impairment which preexisted the February 1994 accident is not persuasive. The greater weight of the evidence indicates claimant has sustained several low back injuries since 1990 and has undergone treatment on each occasion. As early as 1990, Dr. Harbin had diagnosed a probable herniated disc and in 1992 Dr. Tomlins was recommending that claimant utilize a back brace and caution in his activities. From the entire record, it appears that claimant had an ongoing low back problem before February 1994 which constituted an impairment. Under those facts, preexisting functional impairment is properly deducted from the ultimate functional impairment rating which leaves a net figure of 10 percent. See K.S.A. 44-501(c).

(3) Under K.S.A. 44-567, the Workers Compensation Fund should be responsible for a portion of this award. Before February 1994 the respondent had knowledge that claimant had an ongoing back problem and wore a back brace because of a doctor's recommendation. Respondent had also notified the State that claimant was thought to be an impaired worker. The Appeals Board finds that respondent retained claimant in its employment despite its knowledge of a preexisting condition that constituted a handicap in retaining or obtaining employment.

Because of the mechanism of injury surrounding the February 1994 accident, Dr. Prostic believed that claimant's preexisting condition contributed to the resulting disability as contemplated by K.S.A. 44-567(a)(2). When asked to apportion that contribution, Dr. Prostic testified as follows:

"Q. (by Mr. King) And, Doctor, the contribution is in the percentages that you've already given, whatever, 7-1/2 percent to 17-1/2 percent, would be correct?"

"A. Well, I think it's actually larger than that. Because I think that the pre-existing disease at those two levels did make him more easily injured and that

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"Q. Well, okay. It's your opinion that this is not a but for case, that the mechanics of the injury he described to you would have allowed or caused injury to his back despite the prior problem?

"A. It is possible that he could have had the same injury without prior problems.

"Q. And the impairment you gave for problems before 1994 were the 7-1/2 percent rating and a 17-1/2 percent rating at the current time?

"A. Yes."

The above quoted testimony is the only evidence in the record regarding contribution between the preexisting condition and the ultimate disability. Although it establishes that the percentage of contribution is larger than 43 percent (comparing 7.5 percent to 17.5 percent) to the extent the contribution exceeds that percentage is not clear. K.S.A. 44-567(a)(2) directs the fact finder to "determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of [the] award which is attributable to the employee's preexisting physical or mental impairment." Based upon that direction to be equitable and reasonable, the Appeals Board finds that there is a 50 percent contribution between claimant's preexisting physical impairment and the ultimate disability and that the Workers Compensation Fund should be responsible for that amount.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge George R. Robertson dated June 29, 1995, should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terry Pixler, and against the respondent, PKM Steel Services, Inc., and its insurance carrier, Commercial Union, for an accidental injury which occurred on February 16, 1994, and based upon an average weekly wage of \$540.70 for 41.5 weeks of permanent partial general disability benefits at the rate of \$313 per week making a total award of \$12,989.50, for a 10% whole body functional impairment.

As of November 15, 1996, there is due and owing claimant 41.5 weeks of permanent partial compensation at the rate of \$313 per week in the sum of \$12,989.50 for a total of \$12,989.50, which is ordered paid in one lump sum less any amounts previously paid.

Claimant may request future medical care and treatment upon proper application to the Director.

The Workers Compensation Fund is ordered to pay or reimburse 50% of the costs and benefits associated with this Award, including those expenses itemized in the Award.

Claimant's attorney's contract of employment is hereby approved to the extent it is not inconsistent with K.S.A. 44-536.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Kendall R. Cunningham, Wichita, KS
Jeffrey E. King, Salina, KS
Office of Administrative Law Judge, Salina, KS
Philip S. Harness, Director